IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI	**)**	
	)	**Supreme Court No. SC84246**
Respondent	**)**	**Appeal No. ED. 79250**
v.	**)**	**Circuit Court No. 97CR-7281**
	)	
PATRICK LARSON,	**)**	**Court of Appeals Eastern District**
	)	**Circuit Court of St. Louis County**
Appellant	**)**	

ON TRANSFER TO THE SUPREME COURT OF MISSOURI

FROM THE 21ST JUDICIAL CIRCUIT, ST. LOUIS COUNTY

THE HONORABLE JOHN ROSS, JUDGE

DIVISION NO. 15

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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STATE OF MISSOURI V. PATRICK LARSON

NO. SC84246

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JURISDICTIONAL STATEMENT

Appellant Patrick Larson brings this appeal to challenge the denial of his Rule 29.07 motion to withdraw his guilty plea as being untimely filed in the Circuit Court of the County of St. Louis, the Twenty-First Judicial Circuit of Missouri. Appellant was convicted upon his guilty plea in Cause Number 97CR-7281 of two counts of sexual abuse in the first degree (L.F. 23). On December 9, 1998, the circuit court sentenced Mr. Larson to a suspended imposition of sentence and placed him on five years probation for both counts. On January 19, 2001, appellant filed a motion pursuant to Missouri Supreme Court Rule 29.07 to vacate and set aside his conviction based on the fact that the juvenile court had no jurisdiction to certify him as an adult. Appellant currently remains on probation. On March 2, 2001, the plea court denied this motion without ruling on the merits. The plea court determined that the Rule 29.07 motion was untimely filed and waived by the plea of guilty. Appellant filed his timely notice of appeal on March 12, 2001

There is no time limit on the filing of a motion to withdraw a guilty plea under Rule 29.07(d). Denial of such a motion is an appealable order. *State v.*

Pendleton, 910 S.W.2d 268, 271 (Mo. App. 1995); *Belcher v. State*, 801 S.W.2d 372, 374 (Mo. App. 1990).

On February 1, 2002, the Eastern District Court of Appeals transferred the case to this Court on its own motion pursuant to Rule 83.02.

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The Record on Appeal shall be cited to as: Legal File (L.F). and Supplemental Legal file (Supp. L.F.).

STATEMENT OF FACTS

Appellant Patrick Larson was convicted in the St. Louis County Circuit Court upon his guilty plea in Cause Number 97CR-7281 on two counts of sexual abuse in the first degree (L.F. 23). On December 9, 1998, the court suspended imposition of sentence and placed Mr. Larson on five years probation for both counts (L.F. 24).

Prior to his plea of guilty in the St. Louis County Circuit court, appellant had been accused in juvenile court, by petition filed on September 16, 1997, of sodomy and two counts of sexual abuse in the first degree (Supp. L.F. 1). The juvenile court certified appellant as an adult and entered an "order dismissing petition to allow prosecution of juvenile under general law" on December 18, 1997 (Supp. L.F. 1). Appellant was 23 years old at the time the juvenile court entered its order (Supp. L.F. 2).

On January 19, 2001, appellant filed a motion pursuant to Missouri Supreme Court Rule 29.07 to vacate and set aside his conviction based on the fact that the juvenile court had no jurisdiction to certify him as an adult (L.F. 26). Appellant is still on probation (L.F. 24). On March 2, 2001, the plea court denied this motion without

ruling on the merits, finding that it was untimely filed and waived by the plea of guilty (L.F. 39).

Appellant filed a timely notice of appeal on March 12, 2001 (L.F. 40).

This appeal follows. To avoid repetition, additional facts will be presented as necessary in the argument portion of this brief.

POINTS RELIED ON

I

THE PLEA COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.07 MOTION FOR LACK OF TIMELINESS IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, IN THAT THE PLEA COURT INCORRECTLY FOUND THAT THE MOTION WAS UNTIMELY FILED BECAUSE RULE 29.07 HAS NO TIME LIMIT. THE DENIAL OF A 29.07 MOTION IS AN APPEALABLE ORDER.

Reynolds v. State, 939 S.W.2d 451 (Mo.App. W.D. 1996)

State v. Ortega, 985 S.W.2d 373 (Mo.App. S.D. 1999)

Missouri Supreme Court Rule 29.07

Missouri Supreme Court Rule 24.035

II

THE PLEA COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.07 MOTION IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, IN THAT THE PLEA COURT INCORRECTLY FOUND THAT APPELLANT HAD WAIVED HIS RIGHT TO RELIEF WHEN HE PLEADED GUILTY BECAUSE THE PLAIN LANGUAGE OF RULE 29.07 STATES A MOTION TO WITHDRAW THE PLEA MAY BE MADE WHEN THE IMPOSITION OF SENTENCE IS SUSPENDED. THE DENIAL OF A 29.07 MOTION IS AN APPEALABLE ORDER.

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Reynolds v. State, 939 S.W.2d 451 (Mo.App. W.D. 1996)

State v. Kemper, 535 S.W.2d 241 (Mo. App. 1975)

State v. Owens, 582 S.W.2d 366 (Mo. App. 1979)

State v. Ortega, 985 S.W.2d 373 (Mo.App. S.D. 1999)

ARGUMENTS

I

THE PLEA COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.07 MOTION FOR LACK OF TIMELINESS IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, IN THAT THE PLEA COURT INCORRECTLY FOUND THAT THE MOTION WAS UNTIMELY FILED BECAUSE RULE 29.07 HAS NO TIME LIMIT. THE DENIAL OF A 29.07 MOTION IS AN APPEALABLE ORDER.

The Circuit Court clearly erred in denying appellant's Rule 29.07 motion to set aside the plea and conviction for lack of timeliness (L.F. 39). Appellant's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States

Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution were violated. The standard of review is clear error. *Reynolds v. State*, 939 S.W.2d 451, 454 (Mo.App. W.D. 1996).

Appellant's "Motion to Vacate, and Set Aside Judgment of Conviction," although not specificially designated as such, was filed pursuant to Rule 29.07(d) of the Missouri Supreme Court Rules of Civil Procedure which provides in part:

> d) Withdrawal of Plea of Guilty. *A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended;* but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea (emphasis added).

Rule 29.07(d) imposes no time restrictions on the granting of relief under that rule. *Reynolds v. State*, 939 S.W.2d 451, 454 (Mo. App. W.D. 1996).

In Appellant's case, imposition of sentence was suspended and he was placed on probation without ever being delivered to the Missouri Department of Corrections (L.F. 24). Rule 29.07 (d) is thus his only recourse to challenge the invalidity of the guilty plea due to lack of jurisdiction. Because appellant was never delivered to the Missouri Department of Corrections, the time limits of Rule 24.035 do not apply. *Reynolds v. State*, 939 S.W.2d 451, 454 (Mo.App. W.D. 1996). The plea court

erred in finding a lack in timeliness for the motion because appellant is still on probation and Rule 29.07 imposes no time restrictions (L.F. 39).

This court has jurisdiction to hear the appeal. In its opinion, the Court of Appeals for the Eastern District dismissed the appeal for lack of jurisdiction reasoning there was no final judgment in a case where imposition of sentence had been suspended.

In its order granting transfer, the Court of Appeals noted a conflict among the Missouri Courts of Appeals meriting a re-examination of existing law with the decision in *State v. Fensom*, WD59302 (Nov. 20, 2001). The Western District in *Fensom* held that it had jurisdiction of an appeal from an order denying a motion to withdraw a guilty plea in a case where the sentence had not yet been imposed upon the defendant.

Rule 29.07(d) reads:

> A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

On its face, the rule entitled Appellant to file a motion to withdraw when imposition of sentence was suspended. In this case, the basis for his Rule 29.07

motion was to withdraw his guilty plea because the plea court had no jurisdiction over the case and plea counsel failed to raise the lack of jurisdiction at the plea.

Missouri courts have indicated there is jurisdiction as long as the appellant is still on probation and the opportunity to file a 29.07 motion still existed.

In State v. Ortega, 985 S.W.2d 373 (Mo. App. S.D. 1999) the court noted that:

> The trial court had authority to suspend imposition of sentence and place appellant on probation when he pleaded guilty to the criminal charge. See § 559.012, RSMo 1986. It had authority to discharge him from probation prior to expiration of the three-year term of probation that was fixed at the time of the guilty plea. § 559.036.2, RSMo 1994. When the trial court discharged appellant from probation, it discharged him from its jurisdiction with respect to that case....It follows that because of the nature of a suspended imposition of sentence case, the trial court, during the term of assessed probation, continues to have jurisdiction. At the end of the probation period, the trial court 'may discharge [the defendant] from the jurisdiction of the court so that a judgment of conviction may not thereafter be entered upon the verdict in that case.'…This court is obliged to ascertain, *sua sponte*, whether it has jurisdiction to review the matter appellant has attempted to appeal. If

> the trial court lacked authority to grant the relief appellant sought, this court acquired no jurisdiction to review the matter appealed on its merits. *State v. Ortega*, 985 S.W.2d 373, 374 (Mo. App. S.D. 1999)(citations omitted).

Ortega indicates that as long as the trial court had authority to grant the relief sought, the appellate court would have jurisdiction to review the matter. *State v. Ortega*, 985 S.W.2d 373, 374 (Mo.App. 1999). Accordingly, the Court should adhere to the plain meaning of Rule 29.07(d) and permit an appeal even when imposition of sentence is suspended.

The Eastern District's decision in *State v. Shambley-Bey*, 989 S.W.2d 681 (Mo. App. E. D. 1999), the previous case on point after it over-ruled *State v. Kluttz*, 813 S.W.2d 315 (Mo. App. E. D. 1991), does indeed say that a motion to withdraw cannot be appealed where the defendant received a suspended imposition of sentence. *Shambley-Bey* is distinguishable from the issue at hand because *Shambley-Bey* had completed his probation. *State v. Shambley-Bey*, 989 S.W. 2d 681 (Mo. App. E. D. 1999).

Further, it must be noted that the Eastern District did allow an appeal pursuant to 29.07(d) in which a suspended imposition of sentence was given and the appellant was placed on probation in *State v Kluttz*, 813 S.W.2d 315 (Mo. App. E.D. 1991) . *Kluttz* was decided after *State v. Lynch*, 679 S.W.2d 858 (Mo. 1984) which was the

case relied on in *State v. Waters,* 882 S.W.2d 269 (Mo. App. S.D. 1994). *Waters* was the case cited in *State v. Shambley-Bey,* 989 S.W. 2d 681 (Mo. App. E.D. 1999).

Judge Draper's well-reasoned concurrance in *State v. Saffaf,* ED78832 (Oct. 23, 2001), notes that a suspended imposition of sentence indeed has collateral consequences, and there may be reasons why a defendant should be allowed to challenge the validity of his plea regardless of the ultimate disposition. Appellant's case is one in which there are serious collateral consequences: the nature of appellant's conviction, a sex crime, means that he is and shall be routinely required to register as a sexual offender, *even after the completion of his probation*. Additionally, his suspended imposition of sentence is tantamount to a conviction for sentencing purposes in federal court pursuant to United States Sentencing Guidelines Section 4A1.2(a)(3), *even after the completion of his probation*. *United States v. Holland*, 195 F.3d 415, 416 (8th Cir. 1999) (emphasis added).

The conflict in the case law must be resolved in favor of *State v. Fensom*, WD59302 (Nov. 20, 2001): denial of a motion to withdraw a plea is appealable even before imposition of sentence.

Because the plea court's decision to deny the motion was based on erroneous reasoning, the order should be reversed with instructions to consider the motion on the merits of the argument.

II

THE PLEA COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.07 MOTION IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, IN THAT THE PLEA COURT INCORRECTLY FOUND THAT APPELLANT HAD WAIVED HIS RIGHT TO RELIEF WHEN HE PLEADED GUILTY BECAUSE THE PLAIN LANGUAGE OF RULE 29.07 STATES A MOTION TO WITHDRAW THE PLEA MAY BE MADE WHEN THE IMPOSITION OF SENTENCE IS SUSPENDED. THE DENIAL OF A 29.07 MOTION IS AN APPEALABLE ORDER.

The Circuit Court clearly erred in denying appellant's Rule 29.07 motion to set aside the plea and conviction when it found appellant had waived his right to relief after pleading guilty (L.F. 39). Appellant's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution were violated. The standard of review is clear error. *Reynolds v. State*, 939 S.W.2d 451, 454 (Mo.App. W.D. 1996).

Appellant's "Motion to Vacate, and Set Aside Judgment of Conviction," although not specificially designated as such, was filed pursuant to Rule 29.07(d) of the Missouri Supreme Court Rules of Civil Procedure which provides in part:

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A motion pursuant to Rule 29.07(d) is the specific vehicle for withdrawing a guilty plea in the case of a suspended imposition of sentence.

In Appellant's case, imposition of sentence was suspended, he was placed on probation without ever being delivered to the Missouri Department of Corrections, and therefore he has no other recourse to challenge the invalidity of the guilty plea due to lack of jurisdiction (L.F. 24). Because appellant was never delivered to the Missouri Department of Corrections, Rule 24.035 does not apply. *Reynolds v. State*, 939 S.W.2d 451, 454 (Mo.App. W.D. 1996). The plea court erred in finding appellant waived his right to relief after pleading guilty because Rule 29.07 specifically addresses the withdrawal of a guilty plea (L.F. 39).

This court has jurisdiction to hear the appeal. Initially, the Court of Appeals for the Eastern District dismissed the appeal for lack of jurisdiction reasoning there was no final judgment in a case where imposition of sentence had been suspended.

In its February 1, 2002 transfer order, the Court of Appeals noted an inconsistency in the Circuits meriting re-examination of existing law with the decision in *State v. Fensom*, WD59302 (Nov. 20, 2001), in which the Western District held that it had jurisdiction of an appeal from an order denying a motion to withdraw a guilty plea in a case where the defendant had not yet been sentenced.

Rule 29.07(d) reads:

> A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

On its face, the rule entitled Appellant to file a motion to withdraw when imposition of sentence was suspended. In this case, the basis for his 29.07 motion to withdraw his guilty plea was because the court had no jurisdiction over the case and plea counsel failed to raise the lack of jurisdiction at the plea (L.F. 26).

Missouri courts have indicated there is jurisdiction as long as the appellant is still on probation and the opportunity to file a 29.07 motion still existed.

In *State v. Ortega*, 985 S.W.2d 373 (Mo. App. S.D. 1999) the court discussed thusly:

> The trial court had authority to suspend imposition of sentence and place appellant on probation when he pleaded guilty to the criminal charge. See § 559.012, RSMo 1986. It had authority to discharge him from probation prior to expiration of the three-year term of probation that was fixed at the time of the guilty plea. § 559.036.2, RSMo 1994. When the trial court discharged appellant from probation, it discharged him from its jurisdiction with respect to that case…. It follows that because of the nature of a suspended imposition of sentence case, the trial court, during the term of assessed probation, continues to have jurisdiction. At the end of the probation period, the trial court 'may discharge [the defendant]
> from the jurisdiction of the court so that a judgment of conviction may not thereafter be entered upon the verdict in that case.'….
> This court is obliged to ascertain, sua sponte, whether it has jurisdiction to review the matter appellant has attempted to appeal. *If the trial court lacked authority to grant the relief appellant sought, this court acquired no jurisdiction to review the matter appealed on*

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Ortega indicates that as long as the trial court had authority to grant the relief sought, the appellate court would have jurisdiction to review the matter. *State v. Ortega*, 985 S.W.2d 373, 374 (Mo.App. S.D. 1999). Accordingly, the Court should adhere to the plain meaning of Rule 29.07(d) and permit an appeal even when imposition of sentence is suspended.

The Eastern District's decision in *State v. Shambley-Bey*, 989 S.W.2d 681 (Mo. App. 1999), the previous case on point after it over-ruled *State v. Kluttz*, 813 S.W.2d 315 (Mo. App. E.D. 1991) , does indeed say that a motion to withdraw cannot be appealed where the defendant got a suspended imposition of sentence. *Shambley-Bey* is distinguishable from the issue at hand because *Shambley-Bey* had completed his probation. *State v. Shambley-Bey*, 989 S.W. 2d 681 (Mo. App. E. D. 1999).

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Appellant was twenty- three years old at the time he was certified by the family court as an adult, which subjected him to prosecution under the General Law (Supp. L.F. 2). However, at the time the acts of abuse were committed appellant was a juvenile between the ages of fourteen and seventeen (L.F. 5, 26).

The law is well established in Missouri that the Juvenile Court may order a relinquishment of its exclusive jurisdiction over a juvenile defendant only where such relinquishment is predicated on, and supported by, specific findings setting forth the basis for the decision to relinquish jurisdiction. *State v. Bills*, 504 S.W.2d 76 (Mo. banc 1974). It is equally well established that although a juvenile defendant may be charged with a particularly serious or severe crime, this alone would not automatically divest a Juvenile Court of jurisdiction to hear, decide and make disposition of the charges against the juvenile defendant. Id.; see also, §§ 211.031, 211.181 RSMo. (1998). The determination whether or not to relinquish juvenile jurisdiction is entrusted to the discretion of the juvenile judge. *State v. Owens*, 582 S.W.2d 366, 373 (Mo. App. 1979). However, such discretion has legal limits in that a judgment that waives jurisdiction must be accompanied by a statement of reasons for such waiver and must be supported by facts in the record so that a meaningful review is possible. Id. at 373. The applicable standard of review is whether or not, in reaching its conclusion to waive jurisdiction, the Juvenile Court, in view of the totality of the relevant circumstances, abused its discretion. Id.

In *State v. Owens*, 582 S.W.2d 366 (Mo. App. 1979), the Missouri Court of Appeals considered, among several other points on appeal, whether or not the juvenile court acted on sufficient evidence in the record of the juvenile waiver hearing to establish and support each and every finding of the juvenile court in its order

waiving jurisdiction. Id. at 373. The Court in *Owens* found that the juvenile court did base its order on sufficient evidence in the record and that its order was supported by the evidence. Id. However, the *Owens* court examined the juvenile court's order relinquishing jurisdiction under the abuse of discretion standard. In doing so, the *Owens* Court introduced certain relevant factual criteria which have been used by the courts as a basis for such discretion. *State v. Owens*, 582 S.W.2d at 373. The criteria applied by the *Owens* Court are in close conformity with the factors set out in § 211,071, RSMo (1998), which are considered by the court in determining whether the child is a proper subject to be dealt with under the provisions of the General Law or whether there are reasonable prospects of rehabilitation within the juvenile justice system. The overlapping statutory factors include: 1) whether the Juvenile's age, maturity, experience and development are such as to require prosecution under the General Law, 2) whether or not the juvenile had a mental disease or defect which would prevent him from knowing or appreciating the nature, quality or wrongfulness of his conduct, 3) whether or not the nature or seriousness of the juvenile's conduct constitutes a threat to the community, 4) whether or not the act committed by the juvenile was done in a violent and vicious manner, and, 5) whether there is a reasonable likelihood that like further conduct will not be deterred by continuing the juvenile under the juvenile law process. *State v. Owens*, 582 S.W.2d at 373; see also, *Coney v. State*, 491 S.W.2d 501 (Mo. 1973); *State v. Kemper*, 535 S.W.2d 241 (Mo.

App. 1975); *State v. Reagan*, 427 S.W.2d 371 (Mo. 1968) (en banc); *State v. Bills*, 404 S.W.2d 76 (Mo. App. 1974).

In addition to the criteria used in *Owens*, § 211.071 .6(1)-(1 0) RSMo, (1998), includes some broader considerations that the court must weigh such as: (1) the seriousness of the offense and whether the protection of the community requires transfer to the court of general jurisdiction; (2) whether the offense alleged involved viciousness, force and violence; (5) the record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements; (8) the program and facilities available to the Juvenile Court in considering disposition; (9) whether or not the child can benefit from the treatment or rehabilitative programs available to the Juvenile Court. Id.

The case at bar is unique as appellant was certified by the Juvenile Court at the age of twenty-three, some nine years after the commission of the acts with which he was charged (Supp. L.F. 2). However, the factors listed by § 211.071.6 (1)-(10) RSMo. (1998), should not be disregarded in such a case. That statutory language does not provide the Juvenile Court with jurisdiction to entertain a Certification hearing unless the petition "alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult." Id. The order of the juvenile court entered in the instant case acknowledged that he was twenty-three years of age (Supp. L.F. 2). The fact

that the juvenile court's order states that the Appellant is twenty-three is enough to divest the Juvenile Court of jurisdiction to hold a hearing to determine whether the juvenile should be transferred to the court of general jurisdiction (Supp. L.F. 2). In the instant case, however, the Juvenile Court held the Certification hearings despite the requirement of Section 211.071.1. The Court clearly acted beyond its statutory and jurisdictional mandate. Accordingly, any subsequent disposition of appellant's case should be set aside and vacated due to the jurisdictional defect, mainly defective subject matter jurisdiction predicated upon an improper certification.

The juvenile court acted beyond its scope of jurisdiction in certifying appellant as an adult contrary to the express provisions of Section 211.071.1 RSMo. (1998).

This court has jurisdiction to hear the appeal. In its opinion, the Court of Appeals for the Eastern District dismissed the appeal for lack of jurisdiction reasoning there was no final judgment in a case where imposition of sentence had been suspended.

In its order granting transfer, the Court of Appeals noted an inconsistency in the Circuits meriting reexamination of existing law with the decision in *State v. Fensom*, WD59302 (Nov. 20, 2001), in which the Western District held that it had jurisdiction of an appeal from an order denying a motion to withdraw a guilty plea in a case where the defendant had not yet been sentenced.

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On its face, the rule entitled Appellant to file a motion to withdraw when imposition of sentence was suspended. In this case, the basis for his 29.07 motion was to withdraw his guilty plea because the court had no jurisdiction over the case and plea counsel failed to raise the lack of jurisdiction at the plea (L.F. 26).

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Ortega indicates that as long as the trial court had authority to grant the relief sought, the appellate court would have jurisdiction to review the matter. *State v. Ortega*, 985 S.W.2d 373, 374 (Mo.App. 1999). Accordingly, the Court should adhere to the plain meaning of Rule 29.07(d) and permit an appeal even when imposition of sentence is suspended.

The Eastern District's decision in *State v. Shambley-Bey*, 989 S.W.2d 681 (Mo. App. 1999), the previous case on point after it over-ruled *State v. Kluttz*, 813 S.W.2d 315 (Mo. App. E.D. 1991) , does indeed say that a motion to withdraw cannot be appealed where the defendant got a suspended imposition of sentence. *Shambley-*

Bey is distinguishable from the issue at hand because *Shambley-Bey* had completed his probation. *State v. Shambley-Bey*, 989 S.W. 2d 681 (Mo. App. E.D. 1999) .

Further, it must be noted that the Eastern District did allow an appeal pursuant to 29.07(d) in which a suspended imposition of sentence was given and the appellant was placed on probation in *State v Kluttz*, 813 S.W.2d 315 (Mo. App. E.D. 1991) . *Kluttz* was decided after *State v. Lynch*, 679 S.W.2d 858 (Mo. 1984) which was the case relied on in *State v. Waters*, 882 S.W.2d 269 (Mo. App. S.D. 1994). *Waters* was the case cited in *State v. Shambley-Bey*, 989 S.W. 2d 681 (Mo. App. E.D. 1999).

Finally, as Judge Draper in *State v. Saffaf*, ED78832 (Oct. 23, 2001), pointed out in his concurring opinion for the Court of Appeals, a suspended imposition of sentence has collateral consequences, and there may be reasons why a defendant should be allowed to challenge the validity of his plea regardless of the ultimate disposition. Appellant's case is one in which there are serious collateral consequences: the nature of appellant's conviction, a sex crime, means that he is required to register as a sexual offender, and even after he is discharged, his suspended imposition of sentence will count as a conviction in certain situations such as pursuant to the United States Sentencing Guidelines Section 4A1.2(a)(3). *United States v. Holland*, 195 F.3d 415, 416 (8th Cir. 1999) (emphasis added).

The conflict in the case law must be resolved in favor of *State v. Fensom*,

WD59302 (Nov. 20, 2001): denial of a motion to withdraw a plea is appealable even before imposition of sentence.

This Court should vacate the sentence and judgment against appellant and order him discharged.

CONCLUSION

WHEREFORE, appellant prays that the judgment of the Motion Court's denial of appellant's Rule 29.07 motion be reversed, and the cause remanded with instructions to vacate the sentence and judgment, or in the alternative, remanded with instructions to consider the merits of the Rule 29.07 motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

One written copy and one copy on a floppy disk of the foregoing Appellant's Statement, Brief and Argument were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this ___th day of February, 2002.

_____

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI	**)**	
	)	**Supreme Court No. SC84246**
Respondent	**)**	**Appeal No. ED. 79250**
v.	**)**	**Circuit Court No. 97CR-7281**
	)	
PATRICK LARSON,	**)**	**Court of Appeals Eastern District**
	)	**Circuit Court of St. Louis County**
Appellant	**)**	

_____

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

COMES NOW Alan S. Cohen, Counsel for Appellant and pursuant to Rule 84.06(c) states to the Court as follows:

1. Appellant's brief includes the information required by Rule 55.03.
2. Appellant's brief complies with the limitations contained in rule 84.06(b).
3. The number of words in the brief is 6053.
4. A floppy disk containing Appellant's Substitute Brief is also being filed. Counsel certifies that it has been scanned for viruses and is virus-free.

Dated: February 18, 2002

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